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Supreme Court of the United States

October Term—1944

STERLING CARR, Trustee in Bankruptcy of Nippon Yusen Kaisya,

Petitioner,

—*vs.*—

ELLIOTT V. BELL, Superintendent of Banks of the State of New York,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

DAVID HAAR,
Attorney for Petitioner,
270 Broadway,
New York City.

SAM H. LIPSON,
Of Counsel.

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ARGUMENT

POINT I.

Petitioner, a trustee in bankruptcy is entitled to examine the Respondent pursuant to Sec. 21-A of the Bankruptcy Act, 11 U. S. C. A. Sec. 44-A and the order of the Circuit Court of Appeals affirming the order of the District Court which vacated the ex-parte order allowing the examination of the Respondent is inconsistent with and contrary to the intents and purposes of the Statute 9-16

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POINT II.

The Circuit Court erred in deciding that the order of the District Court denying the examination of the Respondent was not an abuse of discretion since the order granting the examination could only be set aside where a clear abuse of discretion appears 16-17

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Supreme Court of the United States

October Term—1944

STERLING CARR, Trustee in Bankruptcy of Nippon Yusen Kaisya,

Petitioner,

—*vs.*—

ELLIOTT V. BELL, Superintendent of Banks of the State of New York,

Respondent.

To the Honorable, the Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

Your petitioner, STERLING CARR, prays that a writ of certiorari issue to review an order of the United States Circuit Court of Appeals for the Second Circuit, dated Aug. 10th, 1944, affirming an order of the United States District Court for the Southern District of New York, granting an order of the Respondent vacating and setting aside an ex parte order for the examination of the Respondent under Section 21-a of the Bankruptcy Act, 11 U. S. C. A., Section 44-a, so far as it applies to the Respondent and quashing a subpoena issued to the Respondent.

Summary Statement of the Matter Involved.

Petitioner, a Trustee in Bankruptcy, duly appointed in the United States District Court for the Northern District of California, Southern Division, obtained an order dated

July 13th, 1943, in the United States District Court, Southern District of New York for an ancillary examination of witnesses within the jurisdiction of this Court, such witnesses being the Respondent, Superintendent of Banks of the State of New York, by a duly authorized representative and the Guaranty Trust Company of New York (fol. 4).

The petition upon which the said order was obtained sets forth among other things, that the Respondent, as Superintendent of Banks of the State of New York, had pursuant to law taken into his possession the assets of the Yokohama Specie Bank, Ltd., and was liquidating the same; that the said Yokohama Specie Bank, Ltd., was at the time of the taking of possession by the Respondent indebted to Nippon Yusen Kaisya, the Bankrupt herein, in the sum of approximately $142,000; that the Trustee had filed two claims with the Respondent for moneys due to the Bankrupt from the said Yokohama Specie Bank, Ltd., and which claims had been rejected by him under the authority granted him under the Banking Laws of the State of New York, and that the Petitioner was about to commence suit against the Superintendent of Banks to sustain the claims filed by him (fol. 16).

The petitioner also stated that he was desirous of examining the Respondent with respect to the acts, conduct and property of the Bankrupt herein with particular regard to its transactions had with the Yokohama Specie Bank, Ltd., pursuant to Sec. 21-a of the Bankruptcy Act, 11 U. S. C. A., Sec. 44-a (fol. 16).

The Respondent thereafter moved to vacate that part of the order of the District Court dated July 13th, 1943, which authorized the examination of the Respondent and to quash the subpoena *duces tecum* issued out of the District Court requiring the Respondent to produce certain records in his possession appertaining to or relating to the transactions by the Bankrupt and the Yokohama Specie Bank for the period from January 1st, 1941 to December 8th, 1941 (fol. 34).

The basis of his objection to the order allowing his examination was that the said order was based on allegations which are "wholly fictitious and false as a matter of law" and that there was no reasonable cause shown for the proposed examination (fol. 53).

In his petition the alleged falsity is based on the claim of the Respondent that a certain deposit made by the Bankrupt in the Yokohama Specie Bank on July 17th, 1941, in the sum of $150,000. could not constitute an illegal deposit as claimed by the petitioner in his supporting petition since it is claimed that the alleged illegality of the deposit was stated to consist of a violation of a proclamation of the President of the United States prohibiting transactions with nationals of Japan, and which proclamation was not signed and published until July 26th, 1941, nine days after the alleged deposit and consequently the allegation of illegality was without basis "as a matter of law upon judicial notice" (fols. 47-48). The Respondent further claimed in his petition that the Yokohama Specie Bank was not authorized to receive deposits but only authorized to receive money for transmittal and that the records of the Yokohama Specie Bank in his possession did not disclose any deposit accounts of the Bankrupt or anyone else (fol. 50).

The Respondent's motion was granted and the order dated February 15th, 1944, was made by the District Court (fol. 85). An appeal was taken by Petitioner from said order to the United States Circuit Court of Appeals for the Second Circuit (fol. 91). On July 7th, 1944, the Circuit Court of Appeals for the Second Circuit (Chase, Clark and A. Hand, *J.J.*) handed down its opinion affirming the order of the District Court (Record 36-38). A petition for rehearing to the said Circuit Court of Appeals was timely filed and said petition for rehearing was denied on July 28th, 1944. The order confirming the order of the District Court was entered on August 10th, 1944 which is the order appealed from (R. 50).

Statute Involved.

The statute involved is Sec. 21-a of the Bankruptcy Act, as amended 11 U. S. C. A., Sec. 44-a.

Questions Presented.

1. Did the Circuit Court of Appeals err in holding that the District Court did not abuse its discretion by denying the petitioner, a trustee in bankruptcy, the right of examination pursuant to Section 21-a of the Bankruptcy Act, 11 U. S. C. A., Sec. 44, of the Respondent a Superintendent of Banks of the State of New York as to transactions between the Bankrupt and the Yokohama Specie Bank, a banking institution taken over for the purpose of liquidation by the said Superintendent of Banks and who had in his possession books and records of the Yokohama Specie Bank which would disclose transactions between said bank and the bankrupt, sought to be examined into by the petitioner?

2. Did the Circuit Court of Appeals err in holding that since the said Superintendent of Banks having disclosed all there was to a business transaction between the Bankrupt and the said Yokohama Specie Bank, sought to be examined into by the Petitioner, presumably with no bias to conceal or to distort the facts, that it was not an abuse of discretion to deny the right of examination pursuant to Section 21-a, 11 U. S. C. A., Sec. 44 to petitioner, particularly after the petitioner has made a showing that the transactions sought to be examined into by the petitioner concerned the acts, conduct or property of the Bankrupt and were suspicious and had evidences of fraud?

3. Did the Circuit Court of Appeals err in affirming the order of the District Court vacating and setting aside the ex parte order for the examination of the Respondent Superintendent of Banks as applicable to him?

Reasons for Granting the Writ.

1 . The decision of the Circuit Court of Appeals for the Second Circuit is probably in conflict with the following applicable decision of this Court.

Cameron v. *United States*, 231 U. S. 710.

2. The decision of the Circuit Court of Appeals is in conflict with the following decisions of other Circuit Courts of Appeal, is in conflict with the following decisions of other Circuit Courts of Appeal on the same matter.

Matter of Eastern Utilities Investing Corporation (C. C. A. 3rd), 98 Fed. 2nd 620;
Travis v. *United States* (C. C. A. 10th), 123 Fed. 2nd 268;
Ulner v. *United States* (C. C. A. 6th), 219 Fed. 641, Cert. Den. 238 U. S. 638.

3. The decision of said Circuit Court of Appeals in refusing to grant petitioner the right to examine the Superintendent of Banks of the State of New York, pursuant to Section 21-a, 11 U. S. C. A., Sec. 44, so far departs from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari issue under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and to send to this Honorable Court for its review and determination, on a day certain to be therein named, a transcript of the record and proceedings herein; and that the judgment of the Circuit Court of Appeals for the Second Circuit be reversed by this Honorable Court, and your petitioner have

such other and further relief in the premises as to this Honorable Court may seem just and proper.

Dated, October 31, 1944.

STERLING CARR,
Petitioner.

By DAVID HAAR,
Attorney for Petitioner.

SAM H. LIPSON,
Of Counsel.